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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 21-0754 – *Robert Hood v. Lincare Holdings, Inc*.

WOOTON, J., dissenting:

The question presented in this appeal was one of compensability. Petitioner Robert E. Hood ("Mr. Hood"), a delivery driver for Respondent Lincare Holdings, LLC ("Lincare"), a durable medical supplies company, was injured in the course of delivering five oxygen tanks to the home of one of Lincare's customers. On the day of his injury Mr. Hood first picked up the empty oxygen tanks from a customer and then delivered the new tanks to the customer's door. Both the pickup and delivery of the oxygen tanks involved ascending and descending steps at the customer's home. When Mr. Hood was descending the steps to return to his truck he heard and felt a pop in his right knee, followed by pain. Mr. Hood testified that he did not slip or fall, nor were there obstacles in his path; rather, his injury appeared to be spontaneous. He also testified that he had no symptoms or problems with his knee prior to this event. He was later diagnosed with a right knee sprain for which he sought worker's compensation benefits. The claims administrator, affirmed by the Office of Judges and the Board of Review, denied his claim on the basis that he did not prove that his injury "resulted from" his employment. The majority now affirms as well, once again making the same error it has made in the past, to wit: flatly ignoring this Court's long-standing jurisprudence on repetitive use injuries and "fail[ing] to articulate why this case should be treated any differently than the countless repetitive use injuries held compensable every day." *Wilson v. Safelite Grp., Inc*., No. 20-0387, 2021 WL 4936286, *5 (W. Va. Sept. 27, 2021) (memorandum decision) (Wooton, J., dissenting). I

would have no problem finding Mr. Hood's injury compensable pursuant to that jurisprudence. Accordingly, I respectfully dissent.

Fundamentally, this State's worker's compensation statutory scheme is "remedial in [its] very nature [and] should be liberally construed to effectuate [its] purpose." *See* Syl. Pt. 6, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953); *see also State ex rel. 3M Co. v. Hoke*, 244 W. Va. 299, 309, 852 S.E.2d 799, 809 (2020) ("Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended.") (quoting *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995)). Under West Virginia law, for an injury to be compensable it must be a personal injury received in the course of employment and resulting from that employment. Syl. Pt. 1, *Barnett v. State Workmen's Comp. Comm'r*, 153 W. Va. 796, 172 S.E.2d 698 (1970); *accord* W. Va. Code § 23-4-1 (2023). This Court has explained that "a[n] [] injury sustained by a covered employee, in the course of and resulting from his employment, which developed over a period of time and did not occur as a result of a single, isolated trauma, is a personal injury" for purposes of a worker's compensation claim. Syl. Pt. 1, *Lilly v. State Workmen's Comp. Comm'r*, 159 W. Va. 613, 225 S.E.2d 214 (1976). To that end, a personal injury may result from repeated performances of a specific job duty. *Id*. at 613, 225 S.E.2d at 214, syl. pt. 2. Moreover, "[a]n employee who is injured gradually by reason of the duties of employment and eventually becomes disabled is, under our workmen's compensation law,

no less the recipient of a personal injury than one who suffered a single disabling trauma." *Id*. at 614, 225 S.E.2d at 214, syl. pt. 3.

Here, Mr. Hood suffered a knee injury in the course of and as the result of his employment. The evidence below indicates that he suffered from a knee sprain acquired while descending a flight of stairs in the performance of his duties as a delivery driver. Mr. Hood testified in his deposition that as part of his duties, while carrying oxygen tanks or other heavy medical equipment, he regularly ascends and descends stairs of varying heights and states of repair, an activity which unquestionably requires repetitive use of and strains the knees. This evidence was unrefuted. In fact, we recognized the compensability of this type of repetitive injury in *Constellium Rolled Products Ravenswood v. Barnette*, No. 18-1123, 2019 WL 6048317 (W. Va. Nov. 15, 2019) (memorandum decision), when we affirmed the Board of Review's finding of compensability where a crane operator's knee popped and gave out while he was ascending a lengthy flight of stairs he was required to climb four or five times each shift. The majority even acknowledges that the thrust of *Barnette* was that the employee "used stairs more frequently than a member of the general public as a part of his job and faced an increased risk of injury" resulting from that more frequent use. The majority fails to explain why Mr. Hood should be treated differently than the employee in *Barnette,* no doubt because there can be no logical explanation for the disparate compensability determinations for a knee injury suffered as a result of repeatedly climbing a lengthy flight of stairs four or five times per shift and a knee injury suffered as a result of repeatedly ascending and descending

flights of stairs throughout the workday while frequently carrying heavy medical equipment.

And let there be no mistake, *Barnette* is merely one of many cases where this Court has recognized the compensability of repetitive use injuries. *See, e.g., Davies v. W. Va. Off. of Ins. Comm'r*, 227 W. Va. 330, 708 S.E.2d 524 (2011) (finding carpal tunnel syndrome traceable to employment compensable); S*partan Mining Co v. W. Va. Off. of Ins. Comm'r*, No. 11-0804, 2013 WL 829052 (W. Va. Mar. 6, 2013 (memorandum decision) (finding osteoarthritis of the knees compensable where miner was required to regularly stoop and crouch as part of his employment). The Intermediate Court of Appeals of West Virginia addressed this matter in *Alcon Laboratories v. King*, No. 23-ICA-268, 2023 WL 5695745 (I.C.A. Sept. 5, 2023) (memorandum decision), and, relying on our precedent in *Barnett* and *Lilly* discussed above, found compensable a repetitive use injury to an employee's back. The employee in that case could not initially even identify the cause of her injury, but later explained that in the course of her employment she was required to assemble and lift heavy boxes throughout the day, acts "which put additional strain on her back." *Id*. at *3. In resolving the matter the Intermediate Court correctly noted that the employee "does not need to point to an isolated incident or occurrence in order to sustain her claim . . . . gradual injury sustained through repetitive motion is sufficient to establish a personal injury when the injury was sustained in the course of and resulting from an employee's employment." *Id*.

Had the majority merely applied the legal precedents of this court to the facts of this case it would have easily found Mr. Hood's injury compensable. *See Cox v. Fairfield Inn*, 14-0871, 2015 WL 3767243 (W. Va. Jun. 16, 2015) (memorandum decision) (finding a sprain compensable where the employee spontaneously twisted her ankle while walking down a hallway to perform her job duties, i.e., confirming guests were checked in). Such a compensability determination would have been consistent with the manner in which this Court has "historically and regularly" dealt with both repetitive use injuries and exposure injuries such as carpel tunnel syndrome or even occupational pneumoconiosis.[1] *See Wilson*, 2021 WL 4936286, at *5 (Wooton, J., dissenting).

The majority opinion markedly improves the jurisprudence of this state by clearly and succinctly articulating the injury-causing risks faced by employees, and further announcing that West Virginia joins most of our sister jurisdictions in utilizing the increased-risk test to determine whether an employee sustained a compensable injury while engaged in a neutral risk activity. Unfortunately, the majority simply misapplied its newly articulated standard to the facts in this case. Mr. Hood was clearly exposed to a greater quantity of risk insofar as he, as part of his employment, was regularly and routinely required to traverse stairs of varying heights and states of repair. Climbing or descending

[1] An injury in the course of employment caused by repetitive use of a particular body part is analogous to the onset of an occupational disease injury insofar as an occupational disease does not typically occur after a single exposure, but after repeated exposures to some condition (e.g., chemicals or coal dust) which results in onset of the disease. *See* W. Va. Code § 23-4-1(f) (setting forth six criteria for establishing occupational disease).

stairs is clearly a neutral risk activity – an activity that is engaged in routinely by the overwhelming majority of the population. However, during normal activities of daily living people do not repeatedly ascend and descend flights of stairs throughout the day. That Mr. Hood's job required him to do so demonstrates that he faced an *increased quantity of* risk. The authority relied upon by the majority in formulating this test, *In re Margeson*, 27 A.3d 663 (N.H. 2011), explained that "an employee who must use stairs more frequently than a member of the general public as part of his job faces an increased risk of injury." *Id*. at 672. Moreover, because Mr. Hood regularly carried heavy oxygen tanks and other similarly heavy medical equipment as he ascended and descended flights of stairs throughout the day, the evidence suggests that he also faced a risk *qualitatively* peculiar to his employment.

The majority's holding is an outlier, contrary to this court's precedents and not in conformity with the new Syllabus 5. Accordingly, for the reasons set forth in this opinion, I respectfully dissent.